

1 SEDGWICK, DETERT, MORAN & ARNOLD LLP
BRUCE D. CELEBREZZE Bar No. 102181
2 bruce.celebrezze@sdma.com
ROBERT N. BERG Bar No. 099319
3 robert.berg@sdma.com
DEAN J. MCELROY Bar No. 213132
4 dean.mcelroy@sdma.com
One Market Plaza
5 Steuart Tower, 8th Floor
San Francisco, California 94105
6 Telephone: (415) 781-7900
Facsimile: (415) 781-2635
7

Attorneys for Defendant
8 NATIONAL FIRE INSURANCE COMPANY
OF HARTFORD
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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 FREDERICK MEISWINKEL, INC., a
California corporation

14 Plaintiff,

15 v.

16 NATIONAL FIRE INSURANCE
COMPANY OF HARTFORD,

17 Defendant.
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CASE NO. 07-05064 WHA MED

**DEFENDANT NATIONAL FIRE
INSURANCE COMPANY OF
HARTFORD'S EVIDENTIARY
OBJECTIONS TO THE
DECLARATION OF JON S. BRICK
SUBMITTED BY PLAINTIFF IN
SUPPORT OF ITS OPPOSITION TO
NATIONAL'S MOTION TO STAY
PROCEEDINGS**

Date: March 27, 2008
Time: 8:00 a.m.
Crtrm: 9
Judge: William H. Alsup
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23 Defendant National Fire Insurance Company of Hartford ("National") submits the
24 following evidentiary objections to the declaration of Jon S. Brick dated March 6, 2008 ("the
25 Brick Declaration") submitted by plaintiff Frederick Meiswinkel, Inc. ("FMI") in support of its
26 opposition to National's motion to stay proceedings.
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1 1. In ¶ 2 of the Brick Declaration, Mr. Brick testifies: “FMI was insured under three
2 policies of insurance issued by Transcontinental Insurance Company, now [National], for the
3 periods January 1998 through January 2001. Defense of the underlying actions was tendered to
4 National pursuant to these policies and, in August of 2004, National agreed to defend FMI by
5 retaining the services of attorney Geoff Wood” National objects to the foregoing testimony
6 on the grounds that it is not based on personal knowledge, but is inadmissible hearsay. Mr.
7 Brick has not demonstrated that he has personal knowledge of the issuance of insurance policies
8 by Transcontinental Insurance Company, the tender of the underlying actions, or National’s
9 response to the tender. To the extent that Mr. Brick learned of the issuance of the insurance
10 policies, the tender of the underlying actions, or National’s response to the tender through a
11 conversation with a third person or a review of the document, the same constitutes inadmissible
12 hearsay. See Fed.R.Evid. 602, 802. Therefore, National requests that the Court strike the
13 foregoing testimony from ¶ 2 of the Brick Declaration.

14 2. In ¶ 3 of the Brick Declaration, Mr. Brick testifies: “In July of 2006, however, the
15 attorney retained by National notified its claims handler, James Teater, of problems associated
16 with National’s refusal to pay for the reasonable and authorized attorneys’ fees incurred in the
17 defense of FMI.” National objects to the foregoing testimony on the grounds that it lacks
18 foundation and is not based on personal knowledge but constitutes inadmissible hearsay. Mr.
19 Brick’s testimony is based on out-of-court statements made by Geoff Wood in a letter dated July
20 13, 2006, which is attached as Exhibit 1 to the Brick Declaration, offered to prove the truth of
21 the matter asserted. See Fed.R.Evid. 602, 802. Therefore, National requests that the testimony
22 set forth in ¶ 3 of the Brick Declaration, as well as Exhibit 1, be stricken in their entirety.

23 3. In ¶ 4 of the Brick Declaration, Mr. Brick testifies: “As a result of CNA’s
24 wrongful refusal to defend its insured, FMI retained our law firm to protect its interest. Under
25 the threat of litigation, National agreed ultimately, along with one of FMI’s other insurers,
26 Zurich North America, to jointly retain the services of the law firm of Burnham & Brown to
27 continue with FMI’s defense.” National objects to the foregoing testimony on the grounds that it
28 lacks foundation and is not based on personal knowledge but constitutes inadmissible hearsay.

1 Mr. Brick has not demonstrated that he has personal knowledge of CNA's decision regarding
2 whether or not to defend FMI, Zurich North America's decision to defend FMI, or the insurers'
3 determination to retain the law firm of Burnham & Brown. To the extent that Mr. Brick learned
4 of the actions taken by National and/or Zurich through a conversation with a third person or a
5 review of a document, the same constitutes inadmissible hearsay. See Fed.R.Evid. 602, 802. In
6 addition, Mr. Brick has failed to provide a foundation for the statement that National agreed to
7 retain the law firm Burnham & Brown "[u]nder the threat of litigation." Moreover, Mr. Brick's
8 characterization of CNA's decision as a "wrongful refusal" and his characterization of National's
9 motivation as arising from the "threat of litigation" constitute impermissible argument and
10 statements of legal conclusions without factual foundation. Therefore, National requests that the
11 testimony set forth in ¶ 4 of the Brick Declaration be stricken in its entirety.

12 4. In ¶ 7 of the Brick Declaration, Mr. Brick testifies: "Notwithstanding this
13 agreement, National continued its pattern of practice of refusing to pay for its share of
14 reasonably incurred defense fees, delayed payment of invoices, and engaged in other conduct
15 establishing its failure to provide a full and complete defense. It became clear that its efforts
16 were more geared towards finding a way out of coverage than in defending its insured, FMI."
17 National objects to the foregoing testimony on the grounds that it is not based on personal
18 knowledge but constitutes inadmissible hearsay. Mr. Brick has not demonstrated that he has
19 personal knowledge of National's actions and conduct in providing a defense for FMI. To the
20 extent that Mr. Brick learned of the actions and conduct of National as set out in his testimony
21 through a conversation with a third person or a review of a document, the same constitutes
22 inadmissible hearsay. See Fed.R.Evid. 602, 802. In addition, Mr. Brick's testimony in ¶ 7
23 constitutes impermissible argument and opinion and statements of legal conclusions without
24 factual foundation. Therefore, National requests that the testimony in ¶ 7 of the Brick
25 Declaration be stricken in its entirety.

26 5. In ¶ 8 of the Brick Declaration, Mr. Brick testifies: "Upon receipt of this decision
27 to wrongfully withdraw from the defense of its insured, FMI once again enlisted the services of
28 our firm to attempt to compel National to abide by its contractual terms and comply with

1 California law. . . . These letters evidence the continued refusal on the part of National to
2 investigate the claim and provide its insured with a defense.” National objects to the foregoing
3 testimony on the grounds that it constitutes impermissible argument and opinion, and involves
4 legal conclusions without factual support or foundation. Therefore, National requests that the
5 foregoing testimony set forth in ¶ 8 of the Brick Declaration be stricken.

6 6. In ¶ 9 of the Brick Declaration, Mr. Brick testifies: “As evidenced by this
7 correspondence, FMI repeatedly provided CNA [National] with sufficient evidence to establish a
8 duty to defend. National refused to engage in any type of investigation on behalf of its insured,
9 and continued to deny a defense to FMI.” National objects to the foregoing testimony on the
10 grounds that it is not based on personal knowledge but constitutes inadmissible hearsay. Mr.
11 Brick has not demonstrated that he has personal knowledge of National’s decision regarding
12 whether or not to provide a defense to FMI. To the extent that Mr. Brick learned of National’s
13 decision regarding whether or not to provide a defense to FMI through a conversation with a
14 third person or a review of a document, the same constitutes inadmissible hearsay. See
15 Fed.R.Evid. 602, 802. In addition, the testimony in ¶ 9 constitutes impermissible argument and
16 opinion, and involves statements of legal conclusions without factual foundation or support.
17 Therefore, National requests that the testimony set forth in ¶ 9 of the Brick Declaration be
18 stricken in its entirety.

19 7. In the first sentence of ¶ 10 of the Brick Declaration, Mr. Brick characterizes
20 materials provided to National in a December 19, 2007 letter as “even further evidence of
21 National’s obligation to defend.” National objects to the characterization on the grounds that it
22 constitutes impermissible argument and opinion, and involves statements of legal conclusions
23 without factual foundation or support. Therefore, National requests that the testimony set forth
24 in the first sentence of ¶ 10 of the Brick Declaration be stricken.

25 8. In ¶ 11 of the Brick Declaration, Mr. Brick testifies: “National failed to have a
26 claims representative present at these mediations, and refused to offer any money towards the
27 settlement – relying on its decision to deny a defense. The failure of National to appear for
28 mediation has had a chilling effect on the settlement process for several reasons. First, National

1 was not at the mediation with any money to contribute towards settlement. Second, the refusal
2 on the part of National to participate provided the excess carrier over National's primary
3 coverage a very simple and easy response to our demand that it contribute towards a settlement.
4 That is, the excess carrier obviously will not contribute until such time as the primary carrier has
5 exhausted."

6 National objects to the foregoing testimony on the grounds that it is not based on
7 personal knowledge but constitutes inadmissible hearsay. Mr. Brick has failed to set forth facts
8 showing that he personally appeared at the mediations referenced in ¶ 11 of the Brick
9 Declaration. To the extent that Mr. Brick learned of what happened at the referenced mediations
10 through a conversation with a third person or a review of a document, the same constitutes
11 inadmissible hearsay. See Fed.R.Evid. 602, 802. In addition, the foregoing testimony set out in
12 ¶ 11 of the Brick Declaration constitutes impermissible argument and opinion, and involves
13 statements of legal conclusions without factual support or foundation. Therefore, National
14 requests that the foregoing testimony set out in ¶ 11 of the Brick Declaration be stricken.

15 9. In ¶ 12 of the Brick Declaration, Mr. Brick contends that "[t]his Court should be
16 aware of the fact" National objects to the foregoing testimony on the grounds that it
17 constitutes impermissible argument and opinion. Therefore, National requests that the foregoing
18 testimony in ¶ 12 of the Brick Declaration be stricken.

19 10. In ¶ 13 of the Brick Declaration, Mr. Brick testifies in part: "FMI has incurred in
20 excess of \$85,000 in attorneys' fees and costs as a result of the above-described bad faith
21 conduct." National objects to the foregoing testimony on the grounds that it lacks foundation as
22 to the purported amount of fees and costs incurred. Mr. Brick has not attached any
23 documentation which would support the statement regarding the amounts incurred by FMI. In
24 addition, Mr. Brick's characterization that the purported amounts incurred by FMI were "as the
25 result of the above-described bad faith conduct" constitutes impermissible argument and opinion,
26 and involves the statements of legal conclusion without factual foundation or support.
27 Therefore, National requests that the foregoing testimony set forth in ¶ 13 of the Brick
28 Declaration be stricken.

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3 For the foregoing reasons, defendant National Fire Insurance Company of Hartford
4 respectfully requests that its evidentiary objections to the Declaration of Jon S. Brick, which is
5 dated March 6, 2008, be sustained.

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7 DATED: March 13, 2008

SEDGWICK, DETERT, MORAN & ARNOLD LLP

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9 By: /s/ Dean J. McElroy

10 BRUCE D. CELEBREZZE

11 ROBERT N. BERG

DEAN J. MCELROY

Attorneys for Defendant

12 NATIONAL FIRE INSURANCE COMPANY
13 OF HARTFORD
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